No. 224.

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In the Supreme Court of the United States.

THE UNITED STATES, PLAINTIFFS IN ERROR,
v.
EDWARD J. FREEL, AS EXECUTOR OF THE last will and testament of Edward Freel, deceased. } No. 224.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

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STATEMENT.

This is a writ of error sued out from this court to the circuit court of appeals for the second circuit, wherein is sought a review of the decision of that court affirming a decision of the circuit court of the United States for the eastern district of New York. The plaintiffs in error filed their complaint in a certain action at law in the said circuit court for the eastern district of New York, wherein recovery was sought for damages against the defendant in error as surety upon the bond of one John Gillies for the construction of a certain timber dry dock located in the navy-yard at Brooklyn, N. Y. The complaint (Record, pp. 1 to 12) set out the original contract, together with two supplemental contracts made between the United States and

John Gillies, and pleaded the substance of the bond of the defendant's testate given for the faithful performance of said contract (Transcript, p. 2), alleging failure of performance and praying for damages.

To this complaint the defendant in error filed a general demurrer (Transcript, p. 13), upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer of the defendant in error was sustained by the circuit court of the United States for the eastern district of New York in an opinion by Judge Thomas (Record pp. 13 to 23), wherein it was held that while the supplemental contract of June 16, 1893, was not such a change of the original contract as would release the surety, yet that the contract of August 17, 1893, was such change of the original contract as would produce that result. Upon appeal being taken from this decision to the circuit court of appeals for the second circuit, the decision of the lower court was affirmed upon the same grounds in an opinion by Judge Wallace. (Record, pp. 28 to 31.)

From this decision of the circuit court of appeals a writ of error was sued out in this court (Transcript, p. 35), and the case is accordingly here for review.

I.

THE SUPPLEMENTAL CONTRACT OF AUGUST 17, 1893, WAS NOT, AS A MATTER OF FACT, A CHANGE IN THE ORIGINAL CONTRACT FOR THE CONSTRUCTION OF THIS DRY DOCK EITHER IN LOCATION OF THE SITE OR IN CHARACTER OF CONSTRUCTION.

The supplemental contract of June 16, 1893 (Transcript, p. 10), is not involved here. The circuit court

held that this supplemental agreement was justified by the terms of the original contract, and that it was not such a change in the original contract as released the sureties. The circuit court of appeals of course did not pass (Transcript, p. 31, folio 59) upon that question, because it was not before them, inasmuch as no cross appeal was taken to that court by the defendant in error, and for the same reason the correctness of the decision of the circuit court upon that question is not here open for review. We are therefore confined to a consideration of the effect of the supplemental agreement of August 17, 1893. (Transcript, pp. 11 and 12.) By the terms of this supplemental agreement the table end or entrance of the dock was set back 64 feet farther from the river than had been tentatively laid down and staked out when the original contract was entered into, and likewise provides that the contractor will perform the necessary additional excavation at and for the increased compensation of $5,063.18. The circuit court and the circuit court of appeals were both of the opinion that by this supplemental contract the original contract had been departed from in that by setting the table end, or entrance, of the dock 64 feet back from the river, the provisions of the original contract wherein it was provided that the dock was to "be located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part," had been violated; in other words, both courts were of opinion that a dock, the entrance of which was located 64 feet from the river, was not located upon the water line, and that therefore there had been

such a change in the location of the dock, and such a departure from the provisions of the original contract, as would release the surety from his obligation.

It will be observed that by the terms of the original agreement this dock had not been definitely located at all, except that it was to be constructed somewhere along the water line in the navy-yard at Brooklyn, N.Y., and that the precise point was to be thereafter designated by the United States. It was admitted by both courts below that the Government might at will have changed the projected site of this dock indefinitely, above or below the site at which it was originally contemplated to build it, so long as it was builded upon the water line. For instance, on page 31 of the transcript the circuit court of appeals said:

> Undoubtedly it would have been within the contemplation of the original contract to change the location of the dry dock from the place originally laid down and staked out to any other place upon the water line of the navy-yard which might have been thereafter designated by the United States. The terms of the contract would have warranted such change, because they provide for the construction of a dry dock at such place on the water line of the navy-yard as shall be designated by the United States.

The whole question here involved, therefore, resolves itself into a determination of whether a dock located 64 feet from the actual water in the river is located along or upon the water line of the Brooklyn navy-yard. What is meant by the water line? Manifestly, it

means the water front. The water line, as a place of designation, is indefinite in the extreme. If high water is meant, then the line would be at one place; and if low water is meant, it would be at another. Manifestly, the employment of such words was not intended by the contracting parties to mean that the dock was to be built in immediate juxtaposition to the actual water in the river, but that it should be built at such reasonable distance from the actual water as was found to be expedient, economical, convenient, useful, or necessary, taking into consideration all of the surrounding circumstances, the conditions of the underlying soil into which the pit was to be dug, the sinuosities of the river at the point selected, the location of other docks, buildings, or improvements in the navy-yard, etc. Such was the interpretation given to precisely similar words in a contract to build a dry dock immediately adjacent to the one now under consideration, in the case of *Simpson* v. *United States* (31 C. Cls. R., 217, at p. 241), which was affirmed by this court in 172 U. S., at page 372. In that case the contract provided (31 C. Cls. R., at p. 223) that the contractors should construct a timber dry dock, "to be located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part;" and in the specifications (31 C. Cls. R., at p. 231) it was provided that the dock should be built "upon an available site to be provided by the Government;" and the question arose upon the construction of these two provisions taken together. The Court of

Claims, speaking through Judge Davis (at p. 241), said:

> The main facts are that this dock was to be built within a relatively limited area of the navy-yard upon an available site upon the water line; that is, a site available in that yard and available primarily for naval purposes, which may be understood to be a site *near* the water, so as to provide short lockage; a site presenting such an entrance as would least be affected by prevailing strong wind and the sharp running tide of the East River; and, finally, such a site (the other conditions being protected) as would be reasonably near the foundries and workshops of the yard.

One of the principal considerations affecting the precise location of a stupendous work of this character is the character of the soil underlying the site selected, whether hard or firm, stable or unstable, of natural or artificial creation, and whether the same be porous so as to admit of the percolation of water from the river in such wise as to escape into the body of the pit during the progress of the work. When a dry dock is to be built it must either be located at a sufficient distance from the river to enable the bank of earth between the entrance or table end of the dock and the river to permit a natural cofferdam, or else an artificial cofferdam must be built at enormous expense and delay. The water from the river must be kept out of the pit during the progress of the work in some way, and it can only be done either by leaving an intervening

space of earth or else by the construction of an artificial cofferdam for that purpose.

The width of the intervening space of earth between the entrance of the dry dock and the water in the river must, of course, depend upon the character of the soil. If the soil is of a very firm, compact, or cohesive character, such as clay, then, of course, the strip of earth between the excavation and the river would be much smaller than in a case where the soil was of a marshy or porous character admitting of the free percolation of water. Now it was proposed in the case at bar to build this dock by leaving a space of earth between the pit and the river so as to form a natural cofferdam, and thus prevent the great expense and delay of building an artificial cofferdam for this purpose, and likewise to locate the table end of the dock at a point sufficiently back from the river to secure firm land to support the gates at the entrance of the dock. The parties to this contract, including the surety, knew full well that the soil in the navy-yard at Brooklyn was of an artificial character, having been made by the dumpings from the city—what is known as filled or made soil; that it was originally a bay, and that hence all of the soil there was of a very soft and porous character, containing fine mica and silica, which, when mixed with water, become quicksand, and this court will take judicial notice of these facts from its own records. (See record in the case of *Simpson* v. *United States*, No. 51, October term, 1898; also p. 377 of 172 U. S.; likewise the findings of fact made by the Court of Claims

in the case of *Simpson* v. *United States*, 31 C. Cls., 217, at pp. 233 and 234). Knowing these facts, therefore, the contractor and his surety, at the time that they entered into the contract to build this dock upon the water line at Brooklyn Navy-Yard, knew very well that it was a physical impossibility to build the dock immediately adjacent to the water, and that its entrance or table end would have to be set back a sufficient distance to prevent the water from flowing into the pit during the progress of construction and to afford a firm support to the gates at the entrance of the dock. Just how far this would be, of course, only time and experience could demonstrate, since the character of this soil is so treacherous that it could not be ascertained by soundings or borings; and it was for this reason that the precise location of this dock was not determined upon in the original contract, and was left to the future determination of the United States by providing that the dock should be "located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part."

It is impossible to conceive of a dry dock not being built along the water line. The Government would hardly commit the folly of building a dry dock, the purpose of which is to receive ships from the roadstead or harbor of the Brooklyn Navy-Yard, for the purpose of docking and repair, at any other place than along the water line. It is inconceivable, for instance, that they would go to the expense of build-

ing a ship canal between the river and the dry dock. If such a thing as that was in the case there would be some merit in the contention here made; but to say that a dock located 64 feet from the river—that is to say, which has a 64-foot entrance from the river—is not along the water line, seems to fall very little short of absurdity.

It is therefore submitted that in view of the fact that the precise location of this dock was not made at the time of the execution of the original contract, but was left to the future determination of the United States, the supplemental agreement of August 17, 1893, whereby the entrance or table end of the dock was located 64 feet from the river, was not, *as a matter of fact*, any change of location whatever, but was a mere future determination of what, under the contract, had hitherto remained inchoate and incomplete.

II.

IF THE SUPPLEMENTAL AGREEMENT OF AUGUST 17, 1893, IS TO BE REGARDED AS A CHANGE IN THE ORIGINAL CONTRACT, THEN IT IS SUCH CHANGE AS IS CONTEMPLATED BY THE CONTRACT ITSELF, AND THE SURETIES ARE STILL BOUND.

By the seventh article of the original contract (Rec., p. 6) it is provided that the dry dock shall conform in all respects with the plans and specifications annexed to the contract and made a part of it, but that if "at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be in writing * * *

and provided that no change herein provided for shall in any manner affect the validity of this contract."

As was said in *Smith* v. *Molleson* (148 N. Y., 241):

> The contract guaranteed is by reference made a part of the bond, and therefore in order to determine the scope of the defendant's undertaking the two instruments must be read together.

As was said by this court in *Benjamin* v. *Hilliard* (23 How., at p. 164):

> The general rule is to attribute to the obligation of a surety the same extent as that of the principal. Unless from the terms of the contract an intention appears to reduce his liability within more narrow bounds, a restriction will not be imposed by construction contrary to the nature of the engagement. If the terms of his engagement are general and unrestricted and embrace the entire subject (*omnem causam*), his liability will be measured by that of the principal and embrace the same accessories and consequences (*connexorium et dependentium*). It will be presumed that he had in view the guaranty of the obligations his principal had assumed.

The obligation of the surety in this case is conditioned that the contractor "shall well and truly perform the stipulations of the contract of even date herewith, agreeing to construct a timber dry dock to be located at the navy-yard, Brooklyn, N. Y." It will be observed that this bond is general and unrestricted and embraces the entire subject, and the surety be-

comes liable by his obligation to see to it that the contractor performs in all respects and particulars the obligations which he assumed under the contract. This bond does not undertake to limit in any respect whatever the liability of the surety nor to contract that liability within narrower limits than the liability of the principal. It does not even stipulate that the dry dock to be built shall be upon the water line, but, on the contrary, obligates the surety to the erection of a dry dock in the navy-yard at Brooklyn, N. Y., in accordance with the contract, plans, and specifications.

So much has been said in the court below concerning the doctrine of *strictissimi juris* in its application to the obligations of sureties that it appears to have led to confusion of thought. That doctrine is not a doctrine of construction or interpretation, but one of application. The true rule of construction is well stated in *Gamble* v. *Cuneo* (21 App. Div. (N Y.), 413), as follows:

> The rule for construing the contract of the surety or guarantor should by no means be confounded with the rule that sureties and guarantors are favorites of the law and have a right to stand upon the strict terms of their obligations. There is no legal prohibition against entering into a contract of suretyship or guaranty. For any contract which it is legal to make it is legal that a surety or guarantor shall become responsible. In the construction of the contract of the surety or guarantor, as well as every other contract, the

> true question is what was the intention of the parties as disclosed by the instrument read in the light of the surrounding circumstances. To say that a certain set of words in a contract means one thing when the principal is defendant and that the same words in the same contract mean another thing simply because the defendant is a surety or guarantor is absurd.

Bearing in mind, therefore, the essential fact, that the obligation of the surety upon this contract is precisely the same as the obligation of the principal, let us briefly examine the provisions of the original contract viewed in the light of surrounding circumstances and gather therefrom the true intent and meaning of the obligation into which the contractor and his surety entered.

It was proposed by this contract to enter upon the construction of a great public work, involving an expenditure of some half a million dollars. However great the skill of the persons engaged upon this project, it was known to be beyond human foresight or ingenuity to provide for every possible contingency, difficulty, and obstruction that would inevitably be met with in so great an undertaking, particularly when it is remembered that such an enormous excavation of earth was to be had where the soil was almost entirely of a made character, surrounded on all sides by water, and where the soil was of an unknown and treacherous character. It was likewise known, of course, that as the work progressed experience or necessity might demonstrate not only the advisability, but the absolute

necessity, of departing from the plans and specifications originally promulgated. To meet this necessity the seventh article was incorporated into the contract for the purpose of supplying a just method of making such changes as might from time to time become necessary and of providing adequate compensation to the contractors for any increase of expense thereby occasioned It can not be doubted for a moment that it was the intention of the parties to this contract to provide by article 7 for such changes in the dock as might from time to time become necessary, nor can it be doubted that it was likewise their intention to provide that no change should impair in anywise the obligations of the contractor or his sureties. The language is that "no change herein provided for shall in any manner affect the validity of this contract." Those words are meaningless unless they refer to the obligation of the surety. A change in the original contract, reduced to writing and made in conformity with the form and procedure provided in the seventh article of the contract, could not possibly affect the validity of the contract as between the Government and the contractor, and the only possible meaning to be attributed to the words in the last clause of the seventh paragraph is an intent on the part of the contracting parties to likewise negative any idea that changes made in pursuance of this provision should in any wise release the obligation of the surety. And when this contract was perused by the surety, and the above-quoted language met with, can it be doubted that he

understood the words to mean that if such changes were subsequently contracted for and performed by the contractor he was to become the surety of such supplemental contract precisely in the same way that he was for the main contract? In the obligation into which he entered he makes no reservation or exception of his liabilities, but contracts in general and unrestricted terms to become the surety of Giles for the faithful performance of the contract of even date with said bond. By referring to the contract he has made the contract a part of his bond, and has thereby obligated himself to the faithful performance of the contract to build a dry dock in the navy-yard at Brooklyn, N. Y., either according to the original location, plans, contract, and specifications or in accordance with such modifications thereof as might from time to time be made between Giles and the United States. It is idle to talk in this connection of the doctrine of *strictissimi juris*. Parties may by their contracts enlarge their liabilities beyond that which the law would otherwise impose *either expressly or by fair implication*, and if they do so enlarge their liabilities by their own contracts the courts will not undertake to relieve them by any process of construction or interpretation, but will enforce the contract as the parties made it. (*The Sun Ptg. and Pub. Assn.* v. *Moore*, Sup. Ct. of the U. S., October term, 1901, No. 49, decided January 13, 1902, and cases cited.)

It is thoroughly well settled that where a contract makes provision for changes of location or character

of construction the surety is as much bound for the due performance of such changes as he was for the original undertaking. The case most similar to the one at bar is the case of *Wehr* v. *The German Lutheran Church* (47 Md., 177). This was an action upon a bond given for the faithful performance of a contract containing the following provision:

> Should the building committee appointed by said congregation desire to make any changes from the drawings and specifications at any time during the progress of the work the same shall be carried out by the said Seigman and Jones without making void or in any manner affecting this contract. Such changes, whether in addition to or deducted from the original work, shall be specified in writing signed by the contractor and the architects and the building committee, the sum to be fixed or allowed for such changes or alterations to be fixed and allowed by the architects and specified by the writing aforesaid.

It will be observed that the provision of this contract is practically identical with the provisions of the contract at bar. Certain changes were made in the structure in accordance with this provision of the contract, and the surety defended upon the ground that he was released from his obligation by such changes having been made without his knowledge and consent, but the court said:

> But if, by the terms of the original contract, additions to or alterations in the work are provided for or left to the judgment and discretion

of the other contracting parties, either *without limit* or within certain limits, then the variation, if within the limits prescribed, is allowed by the contract itself, and the surety can not complain of a variation which he has agreed to by the original contract; and whether the present case falls within the principle here stated depends upon the terms and construction of the original contract and the nature and extension of the changes in and additions to the plan and finish of the work as originally contemplated. We fully concur with the court below in its construction of the contract. We think it clear that the additions and alterations were all within the contemplation of those provisions of the original contract to which we have referred. The power to make additions and alterations, as we have seen, was plainly reserved and was of the most comprehensive nature, and to say that the additions that were actually made were not within the reservation would be placing such a restriction upon the terms of the contract as is neither justified by any rational rule of construction nor consistent with the manifest design of the parties. * * *

It is no argument against the construction adopted that there is great difficulty in fixing a limit within which additions and alterations might be made. That argument, if of any force at all, goes to the denial of the right to make any additions or modifications whatever, a proposition utterly inconsistent with the terms of the contract.

In *The Building and Loan Association* v. *Fitzmorris* (7 Mo. App., 283, 293) the defendants set up affirmative defenses, alleging that the contract had been

changed without their consent. The contract itself provided for changes from "original design or in mode of work" which shall "in no wise vitiate or annul this agreement." The court (at p. 292) say:

> The mere fact that there were departures from the original plans and specifications could not operate such a discharge, because changes under the direction of the architect were expressly provided for in the contract.

In the case of *Village of Chester* v. *Leonard* (68 Conn., 495) the trustees of the plaintiff made a contract with the defendant to build certain waterworks. The other defendants were sureties on the bond furnished by Leonard to the trustees for the faithful performance of the contract. The contract provided that the engineer should have "power to make such changes in the form, dimensions, and alignment of the work as may in the opinion of the engineer and waterworks commissioners be necessary for the proper fulfillment of the work." During the progress of the work certain material changes were made under the foregoing clause in the contract, and the sureties claimed to have been released by reason of such changes, and also claimed to be released because of certain deviations in the manner of making payments to the contractors. The court held that the sureties were released because of the changes made in the method of payment, but with reference to the changes made in the structure it said:

> So far as concerns the changes in the line, site, level, or dimensions of water pipes, they

were all warranted by the provisions of the contract that the quantities of the work to be done as specified were approximate only, and could be increased or diminished by the board of water commissioners, and that the engineer could make such changes in the forms, dimensions, and alignments of the work as might in his opinion and that of the board of water commissioners be necessary for its proper fulfillment. It was for them and not for the courts to determine whether the changes ordered were in fact necessary. Sureties for the performance of the contract so framed must be presumed to contemplate the making of such changes, *and as the defendants did not stipulate for any right to prescribe in determining whether they should be made, there was no occasion to notify anyone but the principal contractor of the fact that they had been ordered.*

Decisions of like import are numerous. For example see—

De Mattos v. *Jordan*, 15 Washington, 378.

Northern Light Lodge v. *Kennedy*, 73 Northwestern Rep., 574 (7 N. Dak., 146).

Beers v. *Strumple*, 22 Southwestern Rep., 620 (Supreme Ct., Mo., 1893; not reported in Mo. Rpts.).

Risse v. *Hopkins Planing Mill Co.*, 40 Pacific Rep., 904 (55 Kans., 518).

McLenan v. *Wellington*, 30 Pac. Rep., 183 (48 Kans., 756).

Hayden v. *Cook*, 34 Nebraska, 670.

Ashenbroedel Club v. *Finlay*, 53 Mo. App., 256.

Smith v. *Molleson*, 148 N. Y., 241.

Many of these cases are cited in the opinion of the learned judge of the circuit court (Transcript, pp. 18, 19, 20), and the doctrine has never been better announced than in the opinion of the circuit court in passing upon the alleged alteration made by the supplemental contract of June 16, 1893, wherein the court said:

> It is unnecessary to determine whether it would be obligatory upon the contractor to enter into the supplemental contract to which reference is made in this article, however doubtful it may be whether the United States is protected in that regard. Nevertheless, the article does provide a procedure to be observed, should occasion arise, for deduction from or addition to the work as prescribed in the plans and specifications, and it is contemplated, at least, that the contractor may enter voluntarily into such a contract, and that such contract shall not affect the validity of the main agreement. Did not the sureties, when reading this provision, discover and understand that such changes might be called for; that the contractor might make a supplemental contract therefor, and that the change stipulated would not invalidate the original contract to which they stood in the relation of parties? Would it be reasonable to hold that the sureties understood, or were fairly justified in understanding, while reading this seventh article, that any changes made pursuant to it would release them from their relation to the original contract, whose continued validity was declared, notwithstanding

such changes? Finally, would it be consonant with the intention of the parties, including the sureties, to read into the seventh article a provision that the making of an auxiliary contract without the consent of the sureties should release them? It is considered that, although the contractor was not by any specific terms obligated to enter into any subsidiary agreement, yet that he might be asked to do so, and that the article contemplated his assent to modifications of the work, without impairing the main obligation or the liability of those who assured its performance. If this be correct, did the contemplated change of the contract justify the agreement for the 70 feet extension of the dock? This presents a grave question, and its solution requires some just rule of general application. Do sureties, by consenting to changes involving an enlargement of the work, consent to an unlimited extension thereof? Could the dry dock have been doubled in length? If the contract were for a two-story house, could it have been increased to twenty stories? If it were agreed that the material should be of wood, could marble be substituted? Obviously, such extensive changes would not be within the thought or the understanding of the parties or the sureties. *But a rule of interpretation, otherwise suitable, can not be defeated by showing the absurdity of its unlimited application. All rules operate within reasonable limits, and the court regards their legitimate use and not their abuse.* Where a building contract contemplates changes in the work which will bind the sureties for the fulfillment of the contract as modified the changes

subsequently made must bear in extent and value some reasonable ratio to the original structure. If the plans and specifications call for a house of particular dimensions and quality, a consent to changes anticipated in the contract should be construed to be limited to changes relevant to, and consistent with, the structure first projected. Changes of such nature, and only such changes, would be anticipated by all the parties to the contract as would be reasonable and cognate to the structure primarily planned and its purpose. In the case at bar, a large dry dock was required by the United States, to be located at a principal navy-yard, and it was manifestly intended for the accommodation of all classes of Government vessels. Article seventh manifestly contemplated that changes in its dimensions might be required, and provided for auxiliary contracts for fixing a due consideration for such extension, without disturbing otherwise the continuance of the principal engagement. The subsidiary contract provided for an extension of 70 feet, which was nearly 12 per cent of the length first adopted, at an increased cost of about 7½ per cent of the whole consideration. Considering the magnitude of the structure as first intended, and its great expense, and the large use to which it was devoted, the change seems to be such as the parties might have had in view in subscribing to the provisions of the seventh article. The change is a homeogeneous and not an incongruous addition, nor even a duplication of parts, as

would be the case in multiplying the stories of a house, but it is the mere symmetrical enlargement or extension of a specific thing, the construction of which was undertaken, and such enlargement is not greater than the customary use of a dry dock by the Government might demand in common sense. Although article 7 might well have contained clearer provisions for the continued obligation of the sureties and the protection of the Government thereby, yet it seems to admit fairly of the interpretation given.

After so learned an exposition of the law applicable to changes made in a contract pursuant to a clause authorizing such changes, it seems strange that the learned circuit judge did not apply the same rule of law to the alleged change made by the supplemental contract of August 17, 1893, as he did to that made by the supplemental contract of June 16, 1893. The idea upon which the circuit court and the circuit court of appeals proceeded in holding that the sureties were released from their obligation by the supplemental contract of August 17, 1893, was that by locating the dock 64 feet farther inward they had thereby changed the location of the dock in such wise as that it was no longer upon the water line. It will be observed that by the first supplemental contract (Record, p. 10) the dock was extended from 600 feet to 670 feet, that is to say, the head of the dock was located 70 feet farther by this extension than was originally intended. Was not this just as much a change in the location of the dock as it was to set the table end of the dock 64

feet farther inland? It will likewise be observed that the first change involved the expenditure of nearly $50,000, and bore a relation of about 12 per cent to the total cost of the entire structure, whereas by the second supplemental contract the increased expenditure was only some $5,000, bearing a relation of a little more than 1 per cent; and yet the first modification was held to be warranted by the contract upon the theory that the change was a homogeneous and not an incongruous addition nor a duplication of parts, whereas the second modification was held to be unwarranted, because by setting the head of the dock 64 feet further inland, the contract to locate the dock upon the water line had been violated. It is admitted both by the circuit court and by the circuit court of appeals that the contract would have authorized the Government to have changed the entire location of this dock up or down the river anywhere within the confines of the navy-yard at Brooklyn (see Rec., p. 31), but both courts seem to be impressed with the idea that the words "place on the water line" must mean immediately adjacent to the water, whereas in truth the true interpretation of those words mean that the dock is to be located at or near or adjacent to the water, as shall best conduce to the purposes for which the structure was erected, and taking into consideration the physical exigencies, limitations, and necessities of the surroundings of the site. (See *Simpson* v. *United States*, 31 C. Cls. R., at p. 241.) Of course, if this dock had been built half a mile or more from the East River, so that a ship canal would

have had to be built between the river and the dry dock, that would be entirely another question; but it does seem most inaccurate to say because the head of the dock is situated 64 feet from the actual river, that therefore it is not situated at some place upon the water line.

In *Smith* v. *Molleson* (148 N. Y., 241) the court said:

> It should also be observed that there is a clause in the contract, the material part of which reads as follows: "Should the owner at any time during the progress of the said work request any alterations, deviations, additions, or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract." The defendants, having, by reference, in effect, made the contract a part of the bond, must be deemed to have assented to these provisions, and to any changes or deviations in the performance of the building contract made under it. She has, in effect, guaranteed the performance of a written contract between other parties, which by its terms permits the parties to change it or deviate from it. While it is not important to consider the real scope of this clause since we prefer to dispose of the question in the case upon the ground that there was no material departure from the contract when properly construed, it should be noted that she consented in advance to changes of such character, which are permitted by the contract in language quite broad and comprehensive.

Such is the case at bar. It can not be doubted that the intention of the contractor, the surety, and the

agents of the United States was, under the seventh clause of this contract, to build a dry dock as nearly as possible in conformity with the original contract, plans, and specifications, but nevertheless to provide in the broadest and amplest way, without in anywise jeopardizing the validity of the contract, or the obligations of the contractor, or the obligations of the surety, for such changes, either in the precise location of the table end or the precise length, or the capacity of the dock, or for any other changes of location or material or of character of construction that should be rendered necessary from time to time in order to complete for the Government a thoroughly substantial and excellent dry dock. The contention of the defendant in error in this case is by a strained technicality to avoid a just liability which he voluntarily assumed with his eyes wide open. The contention is utterly without merit under the severest application of *strictissimi juris*, for that is a rule of application and not of construction.

III.

DEMURRER WAS NOT THE PROPER WAY IN WHICH TO RAISE THE CONTENTION OF THE DEFENDANT IN ERROR.

The demurrer in this case should have been overruled for the reason that the defense relied upon by the defendant in error should have been set up by answer and not by demurrer. The complaint of the plaintiff recites the original contract and two supplemental contracts and the bond, charging that the bond is a part of the contract and has as much application to the supplemental contracts as to the original. This was all the plaintiff was required to do in his plead-

ings. The rule of law is that any substantial change made in a contract *without the knowledge and consent* of the surety will release the surety from his obligation, but want of knowledge and assent is an affirmative defense to be set up by the defendant and is not required to be traversed by the plaintiff in his declaration in anticipation. In the case of *Shepard* v. *May* (115 U. S., at p. 511) the court said:

> But even if it had been shown that Shepard had become the surety of Walker, it was incumbent upon the former to show as a part of his defense that the indulgence given by May to Walker was without his assent. There was no proof of want of assent. The defense therefore failed. (Citing cases.)

So, in an action against a surety on a note, the burden of proof to support the plea of alteration is upon the surety (*Truesdell* v. *Hunter*, 28 Ill. App., 292).

In second Brandt on Suretyship (2d ed., sec. 345) it is said:

> The assent of a surety to an extension of time may be proved, like other facts, by circumstantial evidence, and it has been held that a regular usage of a bank to receive payments by installments, or checks, at sixty or ninety days, or whatever length of time such regular rule prescribed, with interest on the balance in advance, furnishes presumptive evidence of the assent of those who become parties to notes payable to the bank that the payment may be delayed and received in installments according to such usage until the contrary is shown.

(Citing *Crosby* v. *Wyatt*, 10 N. H., 318; and 8 Greenleaf (Me.), 191.)

If these doctrines be sound, then, manifestly, the demurrer was improperly sustained, because the burden of proof to show want of knowledge and assent on the part of the surety of the alleged changes in the contract was upon the plaintiff in error and should have been pleaded and proven, and could not have been raised by demurrer, and in the second place, such evidence as might have been offered by the defendant in error to this effect might have been overcome by the plaintiff in error by submitting parol testimony to prove that as a matter of fact the surety did have actual notice of the so-called changes, and having such actual notice acquiesced and consented thereto. It is not necessary that the surety should have evidenced his assent in writing, and there is nothing whatever in this case to show as a matter of fact that the defendant in error did not actually know of and acquiesce in these so-called changes in the original contract.

It is therefore submitted that the decision of the circuit court of appeals for the second circuit should be reversed and the cause remanded to the circuit court for the eastern district of New York with directions to overrule the demurrer and permit the trial to proceed upon its merits.

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